

**COMMONWEALTH OF KENTUCKY
BOARD OF TAX APPEALS
FILE NO. K05-R-27**

BELLSOUTH TELECOMMUNICATIONS, INC.

APPELLANT

v.

ORDER NO. K-19805

**FINANCE AND ADMINISTRATION CABINET,
DEPARTMENT OF REVENUE**

APPELLEE

* * * * *

This matter comes before the Board of Tax Appeals on the joint motion of appellant and appellee seeking entry by the Board of Tax Appeals of this agreement.

On October 12, 2005, BellSouth Telecommunications, Inc. (“BellSouth”) filed its Petition of Appeal in this matter to appeal the final ruling of the Kentucky Department of Revenue (“Department”) dated September 28, 2005 (the “Final Ruling”) denying BellSouth’s request for refund of sales tax paid with respect to BellSouth’s sales to Kentucky customers of its broadband Internet access service products (referred to collectively hereinafter as “FastAccess”). The Petition of Appeal more fully sets forth the history of the proceedings predating this appeal, and a copy of the Final Ruling is attached thereto.

Based on events that occurred after BellSouth originally filed its request for refund, and in particular the United States Supreme Court’s decision in *National Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005), and the FCC’s decision in *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 2005 FCC LEXIS 5257; 36 Comm. Reg. (P & F) 944 (September 23, 2005, Released; August 5, 2005,

Adopted), the Department has reconsidered its position regarding the taxability of FastAccess and now agrees with BellSouth that FastAccess is not and was not a taxable “communications service” for purposes of Kentucky sales and use tax law. Accordingly, the parties have agreed that the Final Ruling denying BellSouth’s request for refund should be reversed and that the Department should refund or credit all sales tax collected by BellSouth from its customers with respect to FastAccess from January 1, 1999, through December 31, 2005, together with statutory interest pursuant to KRS § 131.183, less any amounts deducted by BellSouth pursuant to KRS 139.770(4) from January 1, 1999, through June 30, 2003, and subject to the requirements of KRS § 139.770(3).

Based on accounting records furnished by BellSouth to the Department, the parties have agreed that the total amount of sales tax paid by BellSouth during the relevant period with respect to FastAccess is \$6,774,911.98. This amount, less any amounts deducted by BellSouth pursuant to KRS 139.770(4) at the time taxes were paid to the state for the period beginning January 1, 1999, and ending June 30, 2003, represents the total amount of tax which, together with applicable statutory interest, is eligible to be refunded or credited to BellSouth, subject to the requirements of KRS § 139.770(3) (the “Refund Amount”). The Refund Amount shall be refunded to BellSouth’s FastAccess customers from whom the taxes were collected through (1) payments or credits made directly to the customer, and/or (2) payments made by BellSouth on the customer’s behalf, including the payment of attorney fees, pursuant to court order regarding the disposition of the Refund Amount in *Clark, et al. v. BellSouth Telecommunications, Inc.*, Civ. No. 3:04-cv-735-H (W.D.Ky.) (the “Class Action”).

In order to satisfy the requirements of KRS § 139.770(3) and to facilitate the process of refunding or crediting such amounts by BellSouth to its customers and by the Department to

BellSouth, the parties have agreed to the following procedure, which procedure shall be subject to any orders of the court in the Class Action regarding payments by BellSouth on behalf of customers, including the payment of attorney fees:

With respect to BellSouth's FastAccess customers who continue to be BellSouth customers, BellSouth shall issue bill credits reflecting the amount of tax paid by each such customer on FastAccess, plus statutory interest thereon. Prior to issuing such bill credits, BellSouth shall compute the applicable statutory interest as of the last day of the month in which the credits will be issued and shall submit to the Department for verification the total amount expected to be issued as bill credits based on BellSouth's customer records at the time of submission. The Department shall indicate its verification or disagreement with such amount within 14 days of the amount being submitted by BellSouth. The Department shall pay BellSouth an amount equal to the bill credits actually issued, less any amounts deducted by BellSouth with respect to such tax amounts pursuant to KRS 139.770(4) for the period January 1, 1999, through June 30, 2003.

With respect to FastAccess customers who are no longer customers of BellSouth, BellSouth shall pay refunds by sending to each such customer's last known address, or to the current address of each such customer who submits updated address information pursuant to the notice issued in connection with the Class Action, a check in an amount equal to the tax paid by each such customer on FastAccess, plus statutory interest thereon. BellSouth shall be entitled to offset such former customer payments, less any amounts deducted by BellSouth with respect to such tax amounts pursuant to KRS 139.770(4) for the period January 1, 1999, through June 30, 2003, as a deduction on line 19 of the Kentucky sales and use tax return, subject to verification by the Department, against tax amounts shown on one or more Kentucky sales and use tax

returns filed by BellSouth after (i) the date of the payment being cashed by a former BellSouth FastAccess customer, or (ii) the date of the payment escheating to the state. To the extent amounts paid by check are not cashed by former BellSouth FastAccess customers or do not escheat to the state, BellSouth is not entitled to an offset on its Kentucky sales and use tax returns.

Notwithstanding any provision of this Agreed Judgment, to the extent that any portion of the Refund Amount is paid by BellSouth on the customers' behalf, including the payment of attorney fees, pursuant to a court order in the Class Action, such amount shall be considered to have been refunded to the purchasers from whom the taxes were collected within the meaning of KRS 139.770(3); and the Department shall pay BellSouth an amount equal to the amount actually paid pursuant to such court order, less any amounts deducted by BellSouth with respect to such amounts pursuant to KRS 139.770(4) for the period January 1, 1999, through June 30, 2003.

Furthermore, BellSouth shall not be required or authorized to implement the customer refund procedure set forth herein until the Class Action, including any appeals, is concluded.

The Board having considered the joint motion of the parties and being otherwise sufficiently advised:

IT IS HEREBY ORDERED AND ADJUDGED that the Final Ruling is **REVERSED**, and **IT IS FURTHER ORDERED** that BellSouth will credit or refund the sales tax collected from its FastAccess customers, together with statutory interest as provided in KRS 131.183(2) in accordance with the procedure agreed to by the parties and set forth above in this Agreed Order, and

IT IS FURTHER ORDERED that the Department will (i) make a payment to BellSouth for the amount credited to its current customers, together with statutory interest as provided in KRS 131.183(2) and less any amounts deducted by BellSouth with respect to such tax amounts pursuant to KRS 139.770(4) for the period January 1, 1999, through June 30, 2003, (ii) credit the sales tax refunded by BellSouth to its former FastAccess BellSouth customers, together with statutory interest as provided in KRS 131.183(2) and less any amounts deducted by BellSouth with respect to such tax amounts pursuant to KRS 139.770(4) for the period January 1, 1999, through June 30, 2003, and (iii) make payment to BellSouth of any portion of the Refund Amount paid on the customers' behalf, including the payment of attorney fees, pursuant to order of the court in the Class Action, together with statutory interest as provided in KRS 131.183(2) and less any amounts deducted by BellSouth with respect to such tax amounts pursuant to KRS 139.770(4) for the period January 1, 1999, through June 30, 2003.

This is a final and appealable order. All final orders of this agency shall be subject to judicial review in accordance with the provisions of KRS Chapter 13B. A party shall institute an appeal by filing a petition in the Circuit Court of venue, as provided in the agency's enabling statutes, within thirty (30) days after the final order of the agency is mailed or delivered by personal service. If venue for appeal is not stated in the enabling statutes, a party may appeal to Franklin Circuit Court or the Circuit Court of the county in which the appealing party resides or operates a place of business. Copies of the petition shall be served by the petitioner upon the agency and all parties of record. The petition shall include the names and addresses of all parties to the proceeding and the agency involved, and a statement of the grounds on which the review is requested. The petition shall be accompanied by a copy of the final order.

A party may file a petition for judicial review only after the party has exhausted all

administrative remedies available within the agency whose action is being challenged, and within any other agency authorized to exercise administrative review.

A petition for judicial review shall not automatically stay a final order pending the outcome of the review, unless:

- (a) An automatic stay is provided by statute upon appeal or at any point in the administrative proceedings;
- (b) A stay is permitted by the agency and granted upon request; or
- (c) A stay is ordered by the Circuit Court of jurisdiction upon petition.

Within twenty (20) days after service of the petition of appeal, or within further time allowed by the Circuit Court, the Kentucky Board of Tax Appeals shall transmit to the reviewing court the original or a certified copy of the official record of the proceeding under review in compliance with KRS 13B.140(3).

**DATE OF ORDER
AND MAILING: April 5, 2007**

**KENTUCKY BOARD OF TAX APPEALS
FULL BOARD CONCURRING**

**Nancy Mitchell
Chair**